BEFORE THE STATE BOARD CF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
JOSEPH AND REBECCA PESKIN)

Appearances:

For Appellants: Jerome Weber, Attorney at Law

For Respondent: Burl D. Lack, Chief Counsel;
Crawford H. Thomas, Associate Tax Counsel

ii

OPINION

This appeal is made pursuant to Section 18594 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protests of Joseph and Rebecca Peskin to proposed assessments of additional personal income tax and penalties in the amounts of $4,260.64, $9,994.95, $15,755.52, $15,645.00, $28,507.50 and $7,507.50 for the years 1948, 1949, 1950, 1951, 1952 and 1953, respectively.

The primary issue presented is whether Appellants were residents of this State, within the meaning of Revenue and Taxation Code Section 17013 (now 17014) at any time during the years under review.

During the years in question and for many years prior thereto, Joseph Peskin (hereinafter alone referred to as "Appellant") and his wife, Rebecca, maintained a seven-room apartment in Chicago, Illinois. Appellant was engaged in the music machine business and owned a considerable amount of real estate in that city. He also owned several summer cottages on Lake Michigan, which were used for both personal pleasure and business entertainment. Appellant was a registered Illinois voter. He maintained several personal bank accounts and a safe deposit box in Chicago.

Beginning early in 1948, Appellant made several short trips to California, spending an aggregate of about four and one-half months here that year. Initially he stayed at the Ambassador Hotel in Los Angeles. In September, Appellant found it more convenient to rent a furnished bachelor apartment in Los Angeles, which he kept throughout the remainder of the period in question. During 1948 Appellant began two sole proprietorships here, both dealing with phonographic equipment. One, J. Peskin Distributing co., operated until sometime in 1951. The other, Alpha Music Company, continued to operate throughout the years involved.

Appellant's daughter, Mildred Silverman, and her husband, Paul Silverman, moved to California in 1946 and Paul assumed the management of J. Peskin Distributing Co.

During 1949, Appellant was present in California for five periods ranging from ten days to three months in length and aggregating about six months. He purchased a house in Palm Springs for $20,000.00 and added improvements costing over $14,000.00. This property, like the Lake Michigan cabins, was used for both personal pleasure and business. Appellant testified that he went to Palm Springs to rest during the winter but never spent more than a month at a time there. In December, 1949, he purchased an $80,000.00 interest in the Guardian Finance Corp. of Chicago.

In 1950, Appellant stayed here on six occasions for intervals ranging up to two and one-half months, a total of seven and one-half months. On April 1 of that year, he purchased a $25,000.00 residence in Beverly Hills which he rented to his daughter and son-in-law, Mildred and Paul Silverman, who have occupied it ever since. Appellants have occasionally stayed with the Silvermans for short periods.

In 1951, Appellant acquired the property and machinery of the Sierra Steel Fabricating Company in Gardena, California, at a cost of $203,321.61. This business, a sole proprietorship, was thereafter managed by Paul Silverman. Appellant was in California four times in 1951 and spent almost ten months here that year. The bulk of this time.was accounted for by two periods running from January to June and September through December.

During 1952, Appellant spent a total of six and one-half months in California composed of six periods, No single period exceeded two and one-half months. In June of that year the Tyler Machine Company of Culver City, California, commenced business. Appellant was its president and owned 60% of its stock. He later acquired the remaining 40%.

In 1953, the last year under review, Appellant's daughter, Mrs. Ruth Entin, moved to California. That spring Appellant began two more businesses as sole proprietorships, Aetna Factors and J. Peskin Enterprises. Aetna Factors engaged in factoring accounts receivable, and J. Peskin Enterprises dealt in real estate and mortgages. Both firms were located in Beverly Hills in a building which Appellant purchased in January, 1953, at a cost of $54,342.40. He also acquired an interest in two parcels of land in the San Fernando Valley. In August, 1953, he sold his interest in the Guardian Finance Corp. of Chicago at a substantial profit. Appellant spent eight and one-half months here that year, made up of six periods, the longest of which did not exceed three months.

Appeal of Joseph and Rebecca Peskin

During the years under review, Appellant registered nine motor vehicles in California, which were generally used by Appellant's various enterprises. All of Appellant's businesses maintained bank accounts, Appellant also opened personal bank accounts here during the period. On two applications for registration of vehicles, Appellant stated that he became a resident of this State on January 15, 1952. Other applications for business licenses and for fictitious business name certificates gave the Los Angeles apartment address as Appellant's residence.

The businesses acquired by Appellant in California were managed largely by his relatives here. and by business associates. Appellant suffered substantial losses every year from his California interests. These amounts varied from a low of $24,773.66 to a high of $66,906.28. In each of these years he derived profits from his Illinois enterprises in amounts ranging from $84,529.27 to $324,580.77.

For the most part, Appellant's wife, Rebecca, did not accompany him on trips to California. There is no evidence that she made other than occasional journeys here to see her children. Also, Appellant's son, Albert, except for one semester spent at the University of Southern California, remained in Illinois throughout the years in question. Appellant's Chicago apartment was Albert's home until 1952, at which time Albert was married and established his own home in Chicago.

In January, 1954, Appellant and his wife closed up their Chicago apartment and moved all their household goods and personal effects to California. Their son, Albert, also moved to California in 1954.

Appellant and his wife filed no California personal income tax returns for the years 1948 through 1953. They contend that they were not residents of California during that time and that since they received no net income from California, they incurred no tax liability. The Franchise Tax Board determined that they were residents of this State during those years and are liable for personal income tax on their entire income, In addition to assessing the normal tax, it applied the 50% fraud penalty and 25% delinquent-return penalty pursuant to Sections 18685 and 18681, respectively, of the Revenue and Taxation Code.

Section 17013 (now 17014) of the Revenue and Taxation Code provides that the term "resident" includes all persons who are in California "for other than a temporary or transitory purpose." The Franchise Tax Board's regulations provide the following regarding the meaning of "temporary or transitory purpose":

> Whether or not the purpose for which an individual is in this State will be considered temporary or transitory in character will depend to a large

> extent upon the facts and cirumstances of each particular case. It can be stated generally, however, that if an individual is simply . . . here for a brief rest or vacation, or to complete a particular transaction, . . . or fulfill a particular engagement, which will require his presence in this State for but a short period, he is in this State for temporary or transitory purposes....
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> If, however, an individual is in this State to improve his health and his illness is of such a character as to require a relatively long or indefinite period to recuperate, or he is here for business purposes which will require a long or indefinite period to accomplish, . . . he is in the State for other than temporary or transitory purposes, and, accordingly, is a resident taxable upon his entire net income even though he may retain his domicile in some other state or country.
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> The underlying theory . . . is that the state with which a person has the closest connection during the taxable year is the state of his residence. (Title 18, California Administrative Code Reg. 17013 - 17015(b).)

Revenue and Taxation Code Section 17015 (now 17016) provides:

> Every individual who spends in the aggregate more than nine months of the taxable year within this State shall be presumed to be a resident. The presumption may be overcome by satisfactory evidence that the individual is in the State for a temporary or transitory purpose.

Prior to May 1, 1951, the above presumption also applied to any individual who maintained "a permanent place of abode within this State."

The Franchise Tax Board has carefully constructed tables showing the time Appellant spent in California. These tables are well documented by reliable evidence and must be accepted in view of the fact that Appellant offered little evidence to dispute these estimates. The amount of time spent in California, however, does not, of itself, control the issue of residence. Time is merely one of the important factors considered in determining the ultimate question of whether the taxpayer had other than a

temporary or transitory purpose. This is made clear by the fact that the statutory presumption of residence, based on time (or abode prior to 1951), may be rebutted by satisfactory evidence of such a purpose.

We are of the opinion that Appellant and his wife have shown by satisfactory evidence that their presence in California during the years 1948 through 1953 was at all times for temporary or transitory purposes.

Appellant, a man of considerable wealth, came to California to establish a music machine business. He subsequently entered other business activities here. According to Appellant's testimony, he did not concern himself with the day-to-day operation of these ventures, but left this task to others, principally members of his family. The pattern of frequent short stays which generally persisted throughout the period is evidence that Appellant's business did not require his constant presence here for long or indefinite periods.

The temporary purpose of Appellant's California visits is suggested by a comparison of his manner of living here with that in Illinois and by the steps Appellant took when he finally did move to California permanently. During Appellant's early trips, he stayed at the Ambassador Hotel. Later in 1948, he rented a furnished apartment. This apartment had no kitchen and Appellant ate at restaurants. Sporadically, he visited his daughter here or occupied a house in Palm Springs which he maintained for business purposes and short stays in the winters. In Chicago, on the other hand, he maintained the apartment which had been the family home for many years. There, his wife usually remained when he traveled to California. A maid was employed there throughout the years in question. Appellant kept almost all of his clothing at that apartment. Until 1953, two of Appellant's three children lived in the Chicago area, These facts all bespeak of a temporary purpose whenever Appellant came to California, His actions of 1954, abandoning the apartment in Chicago and moving the household goods and personal effects to California, emphasiie that his earlier sojourns had only a transitory purpose.

The facts show that Appellant was most closely connected with Illinois. We have already mentioned the personal ties of home and family which were maintained in Chicago during the years in question. Of significance also was Appellant's business connection with the Chicago area. While he did pour thousands of dollars into California ventures, these investments appear small compared to 'Appellant's Illinois interests. Appellant testified that he owned some $2,000,000.00 in Chicago real property and that his music machine business there was forty times larger than the Los Angeles operation. It is noteworthy that Appellant

branched out into the financial field in Chicago during the years under review. The comparison of business interests is pointed up by the fact that his operations in Illinois were highly profitable while he suffered losses in California.

The fact that Appellant signed certain statements or applications giving California as his place of residence is not sufficiently significant to require a conclusion that he was actually a resident. Undoubtedly, Appellant considered it expedient for business reasons to specify the place where he was physically present in California, when here, rather than his Illinois address. Any implied admission that Appellant considered himself a California resident for the purposes of the California personal income tax is amply rebutted by the factual background that we have discussed.

In its arguments, the Franchise Tax Board also contended that Appellant and his wife were domiciled in California. "Domicile" means the place where a person has his true, fixed, permanent home and principal establishment. (Title 18, California Administrative Code Reg. 17013-17015(c).) Considering the views already expressed herein, it is clear that we cannot concur with this position.

We conclude that Appellant and his wife were not residents of this State prior to 1954. Our conclusion eliminates the need for a discussion of the penalties which the Franchise Tax Board sought to impose.

O R D E R

Pursuant to the views expressed in the Opinion of the Board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to Section 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protests of Joseph and Rebecca Peskin to proposed assessments of additional personal income tax and penalties in the amounts of $4,260.64, $9,994.95, $15,755.52, $15,645.00, $28,507.50 and $7,507.50 for the years 1948, 1949, 1950, 1951, 1952 and 1953, respectively, be and the same is hereby reversed.

Done at Sacramento, California this 18th day of July, 1961, by the State Board of Equalization.

John W. Lynch, Chairman
Geo. R. Reilly, Member
Richard Nevins, Member
_____, Member
_____, Member

ATTEST: Dixwell L. Pierce, Secretary